IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:	**:**	**BANKRUPTCY**
	:	
JACK AND ROBERTA PERSKY	**:**	
	:	
Debtors.	**:**	**No. 98-10851SR**

JACK AND ROBERTA PERSKY,	**:**	**CIVIL ACTION**
	:	
Appellants,	**:**	
	:	
v.	**:**	
	:	
United States of America,	**:**	
	:	
Appellee.	**:**	**NO. 98-2729**

M E M O R A N D U M

Reed, J. **October 5, 1998**

This is an appeal by appellants Jack and Roberta Persky ("Perskys") from an order of the United States Bankruptcy Court for the Eastern District of Pennsylvania dated April 16, 1998 dismissing their Chapter 13 bankruptcy case. This court has appellate jurisdiction pursuant to 28 U.S.C. § 158(a). The appeal questions whether the principal and accumulated interest from a spendthrift trust, to which a federal tax lien has attached, can be considered part of the secured claim of the Internal Revenue Service for purposes of determining eligibility under 11 U.S.C. § 109(e). The Bankruptcy Court held that, pursuant to 11 U.S.C. § 506(a), a tax lien on property excluded from the bankruptcy estate was not a secured claim for purposes of the bankruptcy case. For the reasons that follow, I will affirm.

I. Background

In January of 1998, the Internal Revenue Service ("IRS") placed a levy against the wages and income of Jack and Roberta Persky. (R. 10 at 2) Subsequently, the Perskys filed a joint petition for bankruptcy on January 22, 1998. (Id.) As of the bankruptcy petition date, the Perskys were indebted to the IRS in the amount of $328,356.89. (Appellee Brief at 2)

Jack Persky, age 61, earns approximately $1,300 net monthly income working for King Limousine. (R. 5, Schedule I) His wife, Roberta Persky, age 58, is a high school teacher in Philadelphia, earning approximately $1,400 net monthly income. (Id.) Mr. Persky also receives $150 per month from a pension plan with the Commonwealth. (Id.) In addition, Mr. Persky is the beneficiary of a spendthrift trust (the "Trust") from which he receives $833.00 per month. (Id.) The Trust provides that Mr. Persky shall receive no less than $10,000 per year and no more than $15,000 per year. (R. 7, R. 10) As of January 7, 1998, the Trust had an approximate value of $103,310.15. (R. 8)

The IRS filed a proof of claim, listing a secured claim of $29.219.49, an unsecured priority claim of $3,300.00 and an unsecured claim of $295,837.40. The claim is for unpaid federal income taxes.[1] (R. 6) The secured claim is based on the schedules filed by the Perskys. The Perskys' schedule of assets lists real property with a stated current value of $80,000.00 and personal property of $23,460.00, composed of an automobile valued at $17,000.00 and other miscellaneous items. (R. 5) Their schedule of liabilities lists secured claims consisting of a

[1]The Perskys owe $38,691.39 in taxes from 1986 and $3,300 for 1995. They owe penalties in the amount of $77,407.97. In addition, they owe interest on the back taxes and penalties in the amount of $208,957.53 for a grand total owed of $328,356.89. (R. 6)

mortgage on the real estate of $63,000.00 and an auto loan of $17,000.00.[2] (Id.) The IRS is listed as a secured creditor for $23,460.00.[3] (Id.) The IRS is also listed as an unsecured priority creditor and an unsecured general creditor for "unknown amounts." (Id.) Schedule I, current income of Debtors, lists as an item of income to Jack Persky, monthly income from the Trust of $833.00. On March 11, 1998 (the day of their hearing before the Honorable Judge Raslavich), the Perskys amended Schedule B of their petition to include Mr. Persky's interest in the Trust as an asset of the bankruptcy estate. (Appellant Brief at 5 n.3)

The second amended Chapter 13 Plan of the Perskys provides for monthly Trustee payments of $150.00 for sixty months and for payment in full on the allowed secured claims of the IRS with interest post confirmation. (R. 5). In addition, in the plan, the Perskys proposed to surrender their marital residence to their mortgage company and the IRS and to surrender Mr. Persky's interest in the Trust to the IRS.[4] (Id.) Payments on the car loan, however, will be made outside of the Chapter 13 Plan. (Id.)

II. Position of the Parties

The IRS filed a motion to dismiss the Perskys' Chapter 13 case, pursuant to 11 U.S.C. § 109(e), arguing that the amount of the Perskys' unsecured debts makes them ineligible for Chapter 13 bankruptcy. According to 11 U.S.C. § 109(e), eligibility to be a debtor under Chapter

[2]The Perskys also claimed an exemption of $17,000.00 in their residence. (R. 5)

[3]The secured claim of the IRS goes from $23,460 to $29,219 because the IRS included $5,750 of interest if post confirmation interest is paid in the Chapter 13 bankruptcy. (Supplemental R. 3)

[4]As a result of surrendering their residence, the Perskys also argue that the IRS now has an additional $17,000 secured claim, i.e., the remaining equity in the house after the mortgage is paid. (Appellee Brief at 8 n.6)

13 is limited to those individuals who owe, at the petition filing date, less than $250,000.00 in unsecured debt and less than $750,000.00 in secured debt.[5] 11 U.S.C. § 109(e) (1978), as amended by, Amendments of Oct. 22, 1994.

The IRS contends that the Perskys owe more than $250,000.00 in unsecured debt to them alone and are, therefore, ineligible for Chapter 13 pursuant to 11 U.S.C. § 109(e). The IRS wants to prevent the Perskys from filing bankruptcy under Chapter 13 because if the Chapter 13 case is permitted, the Perskys may potentially avoid a large amount of the unsecured tax debt. If the amount of the IRS's unsecured debt is correct, the IRS is also correct that the Perskys are ineligible for Chapter 13.

The Perskys, however, assert that the IRS's claim is mischaracterized, and that the secured portion of their tax debt should be higher and the unsecured portion lower so that they qualify for Chapter 13. The basis for the Perskys' assertion is the existence of Mr. Persky's income interest in the spendthrift trust. It is the Perskys' contention that the tax lien on the trust should be considered part of the IRS's secured claim for purposes of determining eligibility under 11 U.S.C. § 109(e). The Persky's argue that by virtue of the IRS's pre-petition tax lien, the IRS will receive from the Trust, at a minimum, $10,000.00 per year for a total of $50,000.00 over the life of their Chapter 13 Plan.[6] Moreover, the Perskys argue that the Bankruptcy Code allows

[5]On April 1, 1998, pursuant to 11 U.S.C. § 104, the dollar amounts set forth in 11 U.S.C. § 109(e) were increased from $250,000.00 to $269,250.00 in unsecured debt and from $750,000.00 to $807,750.00 in secured debt. Because the Perskys commenced their bankruptcy case prior to April 1, 1998, the new dollar adjustments do not apply.

[6]In the alternative, the Perskys argue that the IRS's lien would extend and attach to the present value of the Trust. This would result in the IRS's secured claim increasing by $103,310.15 and a corresponding decrease in the amount of the Perskys' unsecured debt. The Perskys also argue that the IRS's claim might even include the interest on the Trust as it accrues, further increasing the amount of the IRS's secured claim.

debtors to pay for claims from estate property *or* property of the debtor. See 11 U.S.C. § 1322(b)(8). In real numbers, the Perskys contend that the IRS has a secured debt of at least $79,219.49 and the Perskys' unsecured debt is no more than $249,137.40, enabling them to satisfy the eligibility criteria for Chapter 13 relief.

In rebuttal, the IRS argues that the existence of a pre-petition lien does not necessarily mean that the IRS will be the holder of an allowed secured claim in a bankruptcy case. In essence, the IRS argues that a creditor may have an enforceable lien outside of a bankruptcy case and yet have an unsustainable secured claim within the bankruptcy case. Specifically, the IRS contends that pursuant to 11 U.S.C. § 506(a) a secured claim must be secured by a lien on property in which the estate has an interest. Consequently, because the Trust is excluded from the bankruptcy estate, the lien on the Trust is not a secured claim for purposes of the bankruptcy case.

The Perskys, however, contend that the IRS cannot simultaneously maintain that it has an enforceable pre-petition lien claim and still dispute that it is a secured creditor for purposes of this Chapter 13 case. Specifically, the Perskys argue that even though Mr. Persky's interest in the Trust is not property of the estate pursuant to 11 U.S.C. § 541(c)(2), it is property of the estate for purposes of a federal tax lien.

The Bankruptcy Court agreed with the IRS and found that the claim of the IRS in the bankruptcy case is not secured by the value of the income interest from the spendthrift trust because that income interest is not property of the estate. (R. 2) Accordingly, the Bankruptcy Court dismissed the Perskys' Chapter 13 case, finding that they did not meet the eligibility requirements of 11 U.S.C. § 109(e). (Id.)

III. Standard of Review

Sitting as an appellate court in a bankruptcy case, the district court reviews the bankruptcy court's legal conclusions de novo and its findings of fact for clear error. In re Trans World Airlines, Inc., 145 F.3d 124, 130-31 (3d Cir. 1998).

IV. Discussion

The parties have stipulated to the key underlying facts. First, the parties agree that Jack Persky is the beneficiary of a spendthrift trust, enforceable under Pennsylvania, non-bankruptcy law.[7] (Supp. R. 3) The bankruptcy Code specifically excludes interests in such trusts from the property of the bankruptcy estate. 11 U.S.C. § 541(c)(2); see also Patterson v. Shumate, 504 U.S. 753, 753 (1992). Accordingly, the Court of Appeals for the Third Circuit has stated that "if the debtor's [trust] meets all of the requirements of § 541(c)(2), we must hold that it is completely excluded from the bankruptcy estate." In re Yuhas, 104 F.3d 612, 614 (3d Cir.), cert. denied, 117 S. Ct 2481 (1997).

Second, the parties also agree that a federal tax lien may attach to a beneficiary's interest in a spendthrift trust. (Supp. R. 3) Indeed, under the great weight of federal authority, the

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[7]The Trust provides in pertinent part:

> "[T]he payment of income or principal to any beneficiary, . . . shall not be subject to attachment, execution, sequestration or any order of Court, and the beneficiary shall have no power to pledge, assign, convey or anticipate the same, nor shall such income or principal be liable for the contracts, debts, obligations, engagements or liabilities of any beneficiary, but such income and principal shall be paid by Executor or Trustee to the beneficiary, free and clear of all assignments, attachments, anticipations, levies, executions, decrees and sequestrations, and shall become the property of the beneficiary only when actually received by such beneficiary.

(R. 7 at 4).

restraints on alienation in spendthrift trusts are not effective to prevent a federal tax lien from attaching under 26 U.S.C. § 6321.[8] See, e.g., Bank One Ohio Trust Co., N.A. v. United States, 80 F.3d 173, 176 (6th Cir. 1996); First Northwestern Trust Co. of South Dakota v. Internal Revenue Service, 622 F.2d 387, 390 (8th Cir. 1980); United States v. Rye, 550 F.2d 682, 685 (1st Cir. 1977); Leuschner v. First Western Bank & Trust Co., 261 F.2d 705, 707-08 (9th Cir. 1958); United States v. Dallas Nat'l Bank, 152 F.2d 582, 582 (5th Cir 1945); see also In re Atlantic Business & Community Development Corp., 994 F.2d 1069, 1071-72 (3d Cir. 1993) (discussing the broad scope of § 6321).

Thus, the Court is confronted with the question of whether the tax lien on a spendthrift trust which is excluded from the bankruptcy estate is a secured lien for purposes of calculating eligibility under 11 U.S.C. § 109(e). As previously noted, 11 U.S.C. § 109(e) sets forth the eligibility requirements for Chapter 13 bankruptcy. The statute puts a limit on the amount of secured and unsecured debt a debtor may owe to qualify for Chapter 13.

The Bankruptcy Code also sets forth how a creditor's secured claim is to be determined. 11 U.S.C. § 506; Matter of Day, 747 F.2d 405, 406 (7th Cir. 1984) (holding that § 506 contains test for determining the character of debts for purposes of satisfying the debt limitations of § 109(e)); In re May, 194 B.R. 853, 856 (Bankr. D.S.D. 1996); see also 3 Collier on Bankruptcy ¶ 506.01, at 406-2 (15th ed. 1979) ("the term 'secured claim' as used throughout the Code refers to

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[8]The statute provides, in relevant part:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any cost that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321.

a secured claim as determined under section 506"). The Bankruptcy Code provides, in relevant part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. . . .

11 U.S.C. § 506(a). Thus, a creditors claim is secured only to the extent that the bankruptcy estate has an interest in the property which serves as collateral. Id.

Case law supports the application of § 506(a) to the facts of the present case. Matter of Day, 747 F.2d at 406; In re Wilson, 206 B.R. 808, 810 (Bankr. W.D.N.C. 1996). In In re Wilson, the court held that the IRS did not have a secured claim against the debtor by virtue of a lien against the debtors Civil Service Retirement System ("CSRS") account. 206 B.R. at 810. The court first determined that the CSRS account was not property of the bankruptcy estate pursuant to § 541(c)(2) because of its anti-alienation clause. Id. at 809. Also, the parties had agreed that absent bankruptcy the IRS lien encumbered the account. Id. The court then applied § 506(a), noting that the statute provides that in order to be a secured claim, the creditor must be secured by a "lien on property in which the estate has an interest." Id. at 810. Finally, the court reasoned that although the IRS has a lien on the debtors CSRS account, it does not have a secured claim for purposes of bankruptcy because the asset itself never became property of the estate. Id.

Similarly, in this case, the Perskys have stipulated that the Trust is excluded from the estate by virtue of 11 U.S.C. § 541(c)(2). (Supp. R. 3) The parties have also stipulated that the Trust is encumbered by the IRS' tax lien. It follows that, just as in Wilson, the IRS has a lien on Mr. Persky's interest in the Trust but for purposes of bankruptcy, the IRS does not have a secured

claim against the estate because the Trust is not property of the estate. See 11 U.S.C. §506(a).

The Persky's contention, however, that the IRS's tax lien should nevertheless be considered a secured claim for purposes of their bankruptcy case has limited and not persuasive support in case law. See In re Jones, 206 B.R. 614, 621 (Bankr. D.C. 1997); In re Fuller, 204 B.R. 894, 900-02 (Bankr. W.D. Pa 1997) (IRS is secured creditor to extent of debtor's right to lifetime pension benefits). The Perskys rely on In re Jones, where the court held that although the debtor's Thrift Savings Plan ("TSP") account was not property of the estate pursuant to 11 U.S.C. § 541(c)(2), it was nevertheless property of the estate for purposes of federal tax claims. Id. In In re Jones, the IRS sought attachment of a debtor's TSP account and a determination that its secured claim in the bankruptcy case included the value of the TSP despite its failure to levy on the account before the debtor filed her bankruptcy case. Id. at 615. The Jones Court first determined that the TSP account was subject to a federal tax lien pursuant to 26 U.S.C. § 6321 despite the TSP account's anti-alienation provisions. Id. at 616. The court further determined that the account was not property of the estate pursuant to 11 U.S.C. § 541(c)(2). Id. at 621 (citing Patterson v. Shumate, 504 U.S. at 753). In addition, the court noted that 11 U.S.C. § 506(a) only applied to property of the estate. Id. Thus, the court reasoned that, with respect to state-created statutory liens, a lien on the TSP account would not qualify as a secured claim. Id. Nevertheless, the Jones Court held that "the TSP account would in effect have a split personality by remaining property of the estate for purposes of federal tax claims even though it is not property of the estate for purposes of other creditors' claims. Because the TSP account would be estate property only as to the IRS any plan provision for the IRS's claim must take account of its secured status." Id. (internal citations omitted).

In making its determination that the TSP account would have a "split personality," the Jones Court relied upon In re Lyons, 148 B.R. 88 (Bankr. D.C. 1992). Id. In In re Lyons, however, the court held that the IRS was a secured creditor in the bankruptcy case because its claim was secured by a lien on property of the estate. 148 B.R. at 94. The court recognized that in order for the IRS's claim to be secured under § 506(a), the claim must be secured by a lien on property of the estate. Id. at 92. The court reasoned, however, that the pension plans' provisions were not "enforceable under applicable nonbankruptcy law" because the provisions, although effective against ordinary creditors, were ineffective against the federal tax lien. Id. at 94. Thus, the court determined that the debtor's pension plan was not excludable under § 541(c)(2) and, therefore, the claims IRS was a secured creditor for purposes of the bankruptcy case. Id. at 94.

The circumstances in the case presently before the Court are significantly different that the situation in In re Lyons. Here, the parties have stipulated that the Trust is excluded pursuant to § 541(c)(2). (Supp. R. 3) In addition, the Lyons Court acknowledged that for the IRS to have a secured claim it must have a claim secured by property of the estate. 148 B.R. at 92. Therefore, even under the reasoning of Lyons, the IRS's tax lien on the Trust cannot serve as a secured claim for purposes of bankruptcy because the IRS's claim is not secured by a lien on property of the estate.[9]

Finally, the Persky's contend that a Chapter 13 plan may "provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor" and,

[9]I find nothing in the analysis of the Lyons Court which supports the reasoning of the Jones Court that property excluded from the estate by the Bankruptcy Code has a "split personality" and is nonetheless property of the estate for purposes of a federal tax lien. As well, the Jones Court provides no rationale or analysis for its conclusion. I respectfully decline to adopt the judicial gloss added to the statutory language by the Jones Court.

therefore, the $50,000.00 they propose to surrender under the plan serves to secure the IRS's lien. Their contention puts the cart before the horse. 11 U.S.C. § 1322(b)(8). By its plain language 11 U.S.C. § 1322(b)(8) contemplates payment of an *existing* claim. The Perskys offer no legal support for the proposition that the amount of the IRS's secured claim is determined by the amount of money paid into the bankruptcy plan by non-estate property. Indeed, under the Perskys' reasoning, debtors with non-estate property could manipulate the guidelines set forth in 11 U.S.C. § 109(e) by surrendering a strategic amount in their Chapter 13 plan. This contention is flawed and being unsupported by legal authority, I reject it.

V. CONCLUSION

Based on the foregoing, I will apply the language of the statue and affirm the judgement below. An appropriate Order follows.

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O R D E R

AND NOW, this 5th day of October, upon consideration of the brief of appellants Jack and Roberta Persky (Doc. No. 3), the appellee's brief in response thereto, (Doc. No. 4), as well as the entire record, (Doc. Nos. 1 & 5), for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the order of the Bankruptcy Court dated April 16, 1998 is **AFFIRMED**.

LOWELL A. REED, JR., J.